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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re A.B. et al., Persons Coming Under the Juvenile Court Law.	B215160 (Los Angeles County Super. Ct. No. CK 74803)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. J.B., Defendant and Appellant.	

APPEAL from an order of the Superior Court for the County of Los Angeles. Valerie Skeba, Referee. Reversed.

Kate M. Chandler, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the Los Angeles County Counsel, James M. Owens, Assistant County Counsel, and William D. Thetford, Principal Deputy County Counsel, for Plaintiff and Respondent.

SUMMARY

J.B., the father of two minor girls, A.B. and L.B., appeals from the jurisdictional order of the juvenile court adjudging the minors dependent children under Welfare and Institutions Code section 300, subdivisions (b) and (c).[1] The order was based on findings that the parents created a detrimental home environment because of an ongoing custody battle and hostile relationship, causing their daughters to suffer emotional damage and placing the children at risk of physical and emotional harm. The court placed A.B. with the father and L.B. with the mother and ordered family maintenance services and reunification services for both parents as to the child placed with the other parent.

The father contends the evidence was insufficient to support dependency jurisdiction. We agree and accordingly reverse the jurisdictional order.

FACTUAL AND PROCEDURAL BACKGROUND

A.B. (then 12 years old) and L.B. (then six years old) came to the attention of the juvenile court on September 30, 2008, when the Department of Children and Family Services filed its section 300 dependency petition. The initial petition alleged physical abuse of A.B. by the mother, a history of domestic violence and physical altercations between father and mother in the children's presence, sexual abuse of L.B. by the father (and failure to protect her by the mother) when L.B. was four years old, and sexual abuse (including forcible rape) of the children's now 24-year-old maternal aunt when she was a nine-to-twelve year old child. None of these allegations was ultimately sustained, but an amended petition (filed January 21, 2009) also alleged, under section 300, subdivisions (b) and (c), that:

> "[The parents] have created a detrimental home environment due to an ongoing custody battle and hostile relationship to which the children have been repeatedly exposed and which has caused the children to suffer emotional damage, evidenced by the children's anxiety, depression, and

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[1] All statutory references are to the Welfare and Institutions Code, unless otherwise specified.

> withdrawal. Said ongoing hostility endangers the children's physical and emotional health and safety, and places the children at risk of physical and emotional harm, damage and danger."

The juvenile court sustained these "detrimental home environment" allegations.

The record reveals the following facts:

The parents were married in 1996 and separated in April, 2007, some 17 months before the Department filed its petition. The family had no prior history with the juvenile court, but, according to the Department's detention report, the parents have been involved in family court since their separation. The family court made physical custody orders in favor of the mother, ordering monitored visits for the father. After a "full custody evaluation" in family court, the father's visits became unmonitored, but before any unmonitored visits took place, "a referral alleging sexual molestation by the father … to the minor [L.B.] came to the attention of [the Department]."

The Department's detention report recites a history of referrals to the Department (beginning in November, 2006, prior to the parties' separation). The first referral alleged domestic violence and the mother's suspicion that the father was sexually molesting L.B. (An examination by the children's pediatrician resulted in no signs of sexual abuse.) The second, in May, 2007, alleged the mother was physically abusing A.B. The third, in October, 2007, alleged the mother was seeking counseling services because of the father's sexual molestation of L.B. (L.B. denied any inappropriate touching, and a forensic exam reflected no physical findings of sexual abuse.) The Department investigated all three of these referrals and closed them as unfounded.

Some nine months later, on July 11, 2008, the Department received yet another referral, which eventually led to the Department's September 30, 2008 petition. This fourth referral alleged that L.B. had been the victim of sexual abuse and A.B. was at risk of similar abuse; "the caller was concerned for the safety of the children because Family Court had granted the father unmonitored visits and a visit was to take place the following weekend." This time, L.B., then six years old, told the first responder, according to the detention report, "that 'when she was four years old that her dad touched

her in her private parts.' When asked how it had happened, 'the child stated that she didn't know, but that her mom was present and it happened when they lived together…. The child didn't want to talk anymore after this.'" The social worker who prepared the detention report "resumed the investigation, but the minor stared at the undersigned when asked general questions and she did not speak at all. This behavior has been documented by prior investigators as well." During the Department's investigation, the maternal aunt (an adult) asserted that she had been sexually abused by the father when she was a child. The investigation also revealed that the mother and children attended therapy briefly in May, 2007, but L.B. refused to talk. The mother did not attend the domestic violence support group or individual counseling that had been recommended to her by the Department during its investigations of the earlier referrals that had been closed as unfounded.

The Department's detention report stated that the multiple referrals "may be a product of the parents' using the [Department's] system to try to get at each other during this difficult custody battle," and also stated that the mother "has a valid and continuous restraining order against the father …."[2] The Department decided to file the petition based on the on-going sexual abuse allegations,[3] the unresolved issues due to domestic violence, the emotional state of the children due to multiple investigations by the Department and law enforcement, and the lack of understanding by the parents about the impact of the situation on the children. The Department recommended that the court "order [Department] supervision of the children while they continue to be under the care

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[2] The only order attached to the Department's report (or elsewhere in the record) is a July 17, 2008, order specifying that the father's visitations with the minor children were "temporarily suspended until the next court hearing."

[3] The report observed that it "continues to be unclear if [L.B.'s alleged] molestation took place or not, which brings multiple consequences," described as "[t]he continued risk for similar abuse," and "[t]he confusion in the minor [L.B.'s] mind about whether or not such abuse took place," as she "started to be questioned at an early and impressionable age."

of their mother," and "therapeutic monitored visits [for the father] to continue to assess if he poses a risk to the children." The court found a prima facie case justifying removal of the children from the father's custody and left the children with the mother, stating that it "really [had] a hard time justifying leaving the children with one – one of these parents and removing from the other," but that it would give the Department an opportunity to do a further investigation. Father was given monitored visits with L.B. and unmonitored visits with A.B.

The jurisdiction/disposition report prepared by the Department on October 30, 2008, included interviews with family members. As to the allegations of the father's sexual abuse of L.B., A.B. said that her mother "'is saying that because she wants to get my dad in trouble.'" When asked about her aunt, A.B. said she heard her mother telling her grandmother "'that they were going to say that to get my dad in trouble. It is not true.'" A.B. wanted to live with her father and said her mother blames her (A.B.) "'because I keep denying that my dad touched my sister.'" The social worker described A.B. as appearing "distressed and frustrated over the entire situation." The mother did not want to be interviewed without her attorney present. The father said he had never touched L.B., L.B. had never made any accusation, and "'[i]t is the mother who has been saying all this.'" He denied sexually abusing anybody. The maternal aunt said L.B. told her (the aunt) and L.B.'s mother that the father had touched her private parts, L.B. was having nightmares, and the aunt first found out L.B. was being abused by the father when "'I asked her.' 'What has your dad done to you?'" She also told the social worker about her own sexual abuse by the father when she was 10 to 12 years old; she had not disclosed the abuse until six or seven months prior, when she told her sister (the mother). The maternal grandmother also reported various things the mother had told her about sexual abuse of L.B. and said that about four months ago, L.B. told her (the grandmother) that her father had "touched me here (pointing to her vagina). Yes, it hurt."

The jurisdictional hearing was postponed so that an examination and evaluation of L.B. could take place. In a recorded interview on December 18, 2008, L.B. was "very quiet," gave answers with very few details, and often did not answer at all (including

questions about her father and about anyone hurting any part of her body). L.B.'s physical examination was normal; the evaluator's conclusion was that she was "[u]nable to obtain adequate history to ascertain the possibility of sexual abuse."

In a January 12, 2009, interim review report, the Department reported (in addition to the information on L.B.'s interview) an interview with L.B.'s elementary school teacher. The teacher said L.B. was a good student who was "doing very well in school. She could be withdrawn and quiet at times. She is not very verbal and needs to be prompted a lot. Socially, she mixes well with the other children in the playground. She is opening up more in terms of volunteering in the classroom." This report also included a July 2008 police report in which L.B. had told law enforcement about the alleged abuse. The district attorney's evaluation had concluded the case could not be proven and the "taint of the child custody dispute permeates all reports. (L.B.) cannot articulate any details sufficient to locate any corroboration of a crime." The police told the social worker on December 17, 2008, that "there is a possibility that the mother had been coaching child [L.B.] as [*sic*] to make up the sexual abuse allegations against the father."

On January 21, 2009, the Department filed an amended petition to include the allegations that the parents created "a detrimental home environment due to an ongoing custody battle and hostile relationship to which the children have been repeatedly exposed and which has caused the children to suffer emotional damage…"

The jurisdictional hearing was held on February 2, 2009. In addition to receiving the Department's reports in evidence, the court heard testimony from A.B. and the maternal aunt, focusing principally on the sexual abuse allegations. The court ordered written closing arguments, and on February 11, 2009, held a hearing to issue its ruling. The court stated:

> "Obviously, this is a difficult case. The fact that there's a long history of a custody dispute is one factor. However, the real issue is whether or not these children were abused or are at risk of being abused.
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> I heard from [A.B.]. [A.B.] is, I believe, 12, and she testified quite credibly. When I listened to her testimony, I found no reason to not believe

> her. … [¶] With respect to the maternal aunt, I could say virtually the same thing. When I listened to her, I couldn't find anything to disbelieve. …
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> But clearly, their testimony is completely incompatible. … [¶] The problem is – with [A.B.'s] testimony and the aunt's testimony was that it – at really crucial places, it was completely opposite. And what I'm referring to is the testimony about the nightmares that [L.B.] supposedly had. [¶] The aunt was very clear that she could hear the child crying out in another room, whereas … [A.B.], who was in the same room, said it didn't happen. [¶] And that testimony is so opposed that I cannot ferret out parts that I believe and disbelieve. And what I'm left with is witnesses who contradict each other to the point where I cannot say that I believe either one of them. [¶] And then, on top of that – and I am fully aware that both of them had a motive to fabricate. [A.B.] really wanted to go home, and the aunt and the mother and her side of the family is embroiled in this big family law case with the father. [¶] And because I cannot say, with any degree of certainty, what happened, I am left with, basically, not being able to believe anybody."

The court then dismissed all the allegations except the allegation added in the amended petition – that the parents had created a detrimental home environment, due to the ongoing custody battle and hostile relationship to which the children were repeatedly exposed – which the court said was "pretty accurate":

> "Obviously, [A.B.] was pretty upset. She cried when she talked about what was going on with her family. [¶] And I think that the whole context of this dispute between the parents, the family law case, has colored this case to the point where I can't really say what happened. [¶] … But given the – the diametrically opposed testimony of the aunt and – and [A.B.] on very key parts of their testimony, I'm just not able to say that I believe anybody."

The court sustained the "detrimental home environment" allegations under both subdivisions (b) and (c), giving care, custody and control of the children to the Department. The court placed A.B. with her father, observing that "I believe she was pretty credible about how much she wants to be with dad. And, frankly, I don't find that he poses any risk." L.B. was placed with her mother. The court also ordered family

maintenance services, reunification services as between each parent and the child not placed with that parent, and unmonitored day visits for each parent with the child not in his or her custody. (After L.B. filed a writ petition, the father's visits with L.B. were changed to monitored visits.) The court ordered the parents to go to "Parents Beyond Conflict" and to individual counseling "to address the dysfunctional family relationship they they've created for their children." Counseling for both children was also ordered.[4]

The father filed a timely appeal from the juvenile court's order.

DISCUSSION

The only issue is whether substantial evidence supported the juvenile court's jurisdictional finding that the minors, or either of them, came within the statutory definition of a dependent child. We conclude the evidence was insufficient to support juvenile court jurisdiction.

A. The standard of review.

Our review is constrained by well-known principles. In juvenile cases, just as in other areas, review of the sufficiency of the evidence is confined to determining whether or not there is any substantial evidence, contradicted or not, which will support the conclusion of the trier of fact, resolving all conflicts in favor of the order, and indulging all legitimate inferences to uphold the order, if possible. (*In re Brison C.* (2000) 81 Cal.App.4th 1373, 1378-1379 (*Brison C.*) But "'substantial evidence is not synonymous with *any* evidence,'" and while substantial evidence may consist of inferences, those

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[4] The court then stated its removal orders for the record, finding "by clear and convincing evidence, with respect to [A.B.], that continuance in the home of the mother is contrary to the child's welfare, and a substantial danger exists to the minor's physical and emotional health and safety," and there was "[n]o reasonable means to protect the child without removal from the custody of the mother." And, with respect to L.B., the court similarly found by clear and convincing evidence that "substantial danger exists to the minor's physical and emotional health and safety," and there was "[n]o reasonable means to protect the child without removal from the custody of the father."

inferences must rest on evidence and cannot be the result of speculation or conjecture. (*In re David M.* (2005) 134 Cal.App.4th 822, 828.)

B. The jurisdictional requirements.

In a dependency proceeding, the Department must prove by a preponderance of the evidence that the child who is the subject of a petition comes under the juvenile court's jurisdiction. (*Brison C., supra,* 81 Cal.App.4th at p. 1379.) Section 300 sets forth the grounds for dependency jurisdiction. Section 300 was amended in 1987, and the Legislature's "unmistakable intention in doing so was to narrow the grounds on which children may be subjected to juvenile court jurisdiction." (*Brison C., supra,* at p. 1379.)

Subdivisions (b) and (c) of section 300 form the bases for jurisdiction in this case. Under subdivision (b), a child may be adjudged a dependent child of the court if the child "has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child …." (§ 300, subd. (b).) Under subdivision (c), a child may be declared a dependent child if he or she "is suffering serious emotional damage, or is at substantial risk of suffering serious emotional damage, evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others, as a result of the conduct of the parent or guardian . . . ." (§ 300, subd. (c).)

1. Section 300, subdivision (c).

We begin with subdivision (c), because the thrust of the Department's allegations was that the children suffered emotional damage as a result of the parents' conduct. To prove that A.B. or L.B. came within the statutory definition, the Department "bore the burden of establishing the following three elements: (1) serious emotional damage as evidenced by severe anxiety, depression, withdrawal or untoward aggressive behavior or a substantial risk of severe emotional harm if jurisdiction is not assumed; (2) offending parental conduct; and (3) causation." (*Brison C., supra,* 81 Cal.App.4th at p. 1379.) "'While evidence of past conduct may be probative of current conditions, the question under section 300 is whether circumstances *at the time of the hearing* subject the minor to the defined risk of harm.'" (*Ibid.*)

In this case, the juvenile court made no specific factual findings to support its conclusion that the children were suffering "serious emotional damage … evidenced by severe anxiety, depression, [or] withdrawal …." (§ 300, subd. (c).) The court's sole comment on either child's emotional state was that when she testified, A.B. was "pretty upset" and "cried when she talked about what was going on with her family." The only evidence the Department cites to support the court's finding of "serious emotional damage" consists of the following:

- As to A.B., the Department's detention report, which stated that A.B. "has expressed that she wants to harm herself partly due to the feud that the parents are experiencing", A.B.'s testimony that her parents' fighting made her "feel bad," made her "feel depressed and stressed and caused her to suffer headaches and stomachaches, and to cry," and the fact that A.B. cried when she testified.[5]
- As to L.B., the fact that she was entirely unresponsive to persons trying to question her, thus "prevent[ing] any meaningful forensic examination."

Based on a review of case precedents, we have concluded that the cited evidence is entirely insufficient to support a finding of "serious emotional damage … evidenced by

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[5] The Department's statement that A.B. testified that her parents' fighting "made her feel depressed" is not strictly accurate. A.B. testified that:

- She had been in other courts, knew her parents were fighting, and that made her feel "bad," because she "[didn't] like coming to the courts."
- Counsel asked A.B. if she felt "depressed," and A.B. said yes, but when asked what that meant to A.B., she said, "Like, stressed …." She said she had no trouble sleeping; when asked if she had headaches, she said, "sometimes."
- When asked "[h]ow do you know you're stressed," A.B. said, "[b]ecause, … like, I don't feel good," and "Like, my head hurts and my stomach sometimes." When asked if she remembered crying about her mom and dad fighting, she said, "A lot." At that point, A.B. began to cry.

severe anxiety, depression, [or] withdrawal …."[6] (§ 300, subd. (c).) In addition, even if there were evidence of "serious emotional damage," there is no evidence at all that any conduct by the father constitutes the "ongoing hostility" that the Department alleges is the cause of the emotional damage to the children.

We begin with the court's observations in *In re John W.* (1996) 41 Cal.App.4th 961 (*John W.*) *John W.* was – as this case seems to be – a "bitter child custody case which became a juvenile dependency case on the strength of unproved allegations of child molestation." (*Id.* at p. 964.) In *John W.*, the court observed that there may be cases where, as in *Anne P.* (see *post*), the hatred that divorcing spouses display toward each other may be such that juvenile court jurisdiction "based on the ensuing severe

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[6] The Department asserts the father has forfeited his right to challenge the juvenile court's jurisdictional finding under section 300, subdivision (c), because in his closing argument, he asked to be stricken from the "detrimental home environment" counts (rather than asking that they be dismissed outright), and only argued that he was "not responsible for any emotional harm [A.B.] might be suffering" (rather than arguing that the harm was not serious enough to warrant juvenile court jurisdiction). The Department says it would be "fundamentally unfair to permit a party to lull the juvenile court into believing that a decision is acceptable, and then to appeal, claiming an error that was not raised in the trial court, giving the trial court no opportunity to correct the alleged error." We see no merit to this argument. This is not a case in which the father failed to raise an issue before the juvenile court; the issue before the juvenile court was the sufficiency of the evidence to support jurisdiction. The father clearly raised that issue, asking the juvenile court to "dismiss the petition alleging his physical abuse, failure to protect, causing serious emotional damage, and sexually abusing said minors, as the Department … has failed to meet its burden of proof." That suffices to preserve his right to challenge the jurisdictional findings on appeal. Moreover, the juvenile court could not conceivably have been "lull[ed] … into believing that [its] decision [was] acceptable," because all the other parties expressly argued that neither L.B. nor A.B. was suffering from serious emotional damage. L.B.'s counsel argued there was insufficient evidence that L.B. suffers from serious emotional damage and asked the juvenile court to dismiss the allegations that are at issue in this appeal. So did the mother. A.B.'s counsel also argued that A.B. "does not appear to be suffering from symptoms that rise to the level of severe emotional damage" under section 300, subdivision (c). In short, the Department's argument that the father forfeited his right to challenge the juvenile court's jurisdictional finding is quite wrong.

emotional distress" will be necessary, "[b]ut such cases should be extremely rare." (*John W.,* at p. 975.)

The cases, including those on which the Department relies, confirm that none of the evidence presented by the Department in this case establishes the "severe anxiety, depression, [or] withdrawal" necessary to evidence serious emotional damage:

- First, *In re Shelley J.* (1998) 68 Cal.App.4th 322 (*Shelley J.*) "typifies cases in which dependency based on a finding of emotional harm is upheld." (*Brison C., supra,* 81 Cal.App.4th at p. 1381.) In *Shelley J.*, the court concluded there was substantial evidence to support "serious emotional damage" under subdivision (c). (*Shelley J., supra,* 68 Cal.App.4th at pp. 329-330.) Shelley J. had run away from home – which was so "full of raw garbage" and "clutter" that it presented a serious risk to health and safety. (*Id*. at P. 325.) She remained away for four months (during this period, also running away from a children's shelter to which the police had brought her and stealing her mother's wallet). When she returned she was "emotionally distraught" and told her mother she would commit suicide if she had to return to the children's shelter. (*Id.* at pp. 325-326.) The substantial evidence for jurisdiction under section 300, subdivision (c) was provided by a psychologist who evaluated the parents and described the minor's behavior as "acting out," activity which he attributed to the "deplorable unhealthy, unsafe, and embarrassing home conditions created by" the parents. (*Id*. at pp. 329-330.) In the case at bar, no one presented psychological testimony relating to either the parents or the children, and there was no evidence of inappropriate behavior by either child.
- Second, the Department relies on *In re Anne P.* (1988) 199 Cal.App.3d 183 (*Anne P.*), where the Court of Appeal found sufficient evidence to support the juvenile court's finding that the child "was suffering from a severe psychological disturbance which was caused by the unrelenting struggle

between her parents."[7] (*Id.* at p. 199.) The court found ample evidence that Anne "was in fact disturbed" (though the evidence concerning the cause of her psychological problems was "more ephemeral"). (*Ibid.*) The evidence of emotional disturbance included (1) a videotaped interview with a court-appointed psychiatrist showing the child "distraught and unhappy"; (2) testimony from a probation officer who had repeated contact with the child, stating that she was "'conflicted, confused, suffering a sense of loss, depression' and had 'tremendous unmet needs'"; (3) evidence from multiple sources indicating the child had developed "a near pathological fear of men"[8]; and (4) testimony from the child's foster mother, with 22 years experience as a foster parent, who thought the child "was one of the more emotionally disturbed children she had cared for," and "was in danger of losing complete control and 'going off the deep end.'" (*Id.* at pp. 190-191.)

- By contrast, the *Brison C.* court found the evidence before it *not* sufficient to show the child was "seriously emotionally damaged or that he is in danger of becoming so unless jurisdiction is assumed." (*Brison C., supra,* 81 Cal.App.4th at p. 1379.) The "sole indication of emotional difficulties is

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[7] In *Anne P.*, jurisdiction was sustained under the statute as it existed before it was amended in 1987. Former section 300, subdivision (a) then provided for jurisdiction if the child was a person who "'is in need of proper and effective parental care or control and has no … parent or guardian willing to exercise or capable of exercising care or control ….'" (*Anne P., supra,* 199 Cal.App.3d at p. 189 & fn.4, quoting former § 300, subd. (a).)

[8] When the child first met her foster mother's husband, "she panicked and retreated to her bedroom and did not want to come out." When her foster mother's grown sons came to visit, again the child "retreated to her bedroom and refused to come out," saying "'I don't want to come out, there is men.'" She also expressed fear of other men, including a male social worker and her own attorney. (*Anne P., supra,* 199 Cal.App.3d at p. 191.)

> Brison's deep dislike and fear of his father," which the court said was not caused entirely by the battle for his custody and which "does not inherently prove serious emotional disturbance or unhealthy parental alienation." (*Id.* at p. 1380.) The court observed that Brison mentioned having nightmares, but "[o]ccasional nightmares are not per se abnormal." As in this case, "[n]o psychological testimony was presented." (*Id.* at p. 1380.) The court also rejected a contention that the child's comments about suicide – that he thought of suicide if forced to live with his father (*id.* at p. 1378) – constituted proof that the child was seriously emotionally disturbed. The court observed that the child had "no plans to follow through on the threatened act" and had not exhibited any self-destructive behavior. (*Id.* at p. 1380.)

The evidence in this case does not come close to the level of *Shelley J.* or *Anne P.*, where the evidence was sufficient to support jurisdiction. It even falls below the level of *Brison C.*, where the evidence was *not* sufficient to support jurisdiction. This is hardly one of those "extremely rare" cases contemplated by *John W., supra*.

As to L.B., the evidence showed she was entirely unresponsive to questions about the alleged sexual abuse and that she was not a verbal child. But at the same time, the recent evidence from her schoolteacher showed a rather different child: "withdrawn and quiet at times," but a good student who was doing very well in school, who mixed well socially with other children, and who was "opening up more in terms of volunteering in the classroom." This was not a child suffering "serious emotional damage, evidenced by … withdrawal," within the contemplation of the statute.

The same is true with respect to A.B. The Department repeatedly refers to A.B.'s "wanting to harm herself." To support this claim, the Department cites just one page, 17, of the clerk's transcript. That page contains the Department's statement in its September 30, 2008, detention report that A.B. "expressed that she wants to harm herself partly due to the feud that the parents are experiencing" – a statement that is not repeated in any of the Department's subsequent reports, including its reports of its own interviews with A.B.

Nor did anything in A.B.'s testimony at the jurisdictional hearing indicate a desire to harm herself. (See *Brison C., supra,* 81 Cal.App.4th at p. 1380 [rejecting the contention that the child's comment about suicide was proof that the child was emotionally disturbed, where the child had "no plans to follow through on the threatened act" and had not exhibited any self-destructive behavior].) Nor can stress, headaches, and stomachaches constitute sufficient evidence of the "severe anxiety [or] depression" necessary to justify placing a child under the jurisdiction of the dependency court.

We note also that, even if serious emotional damage could be found under these circumstances, the record is completely barren of evidence that the father's conduct toward L.B. or A.B. caused the emotional harm alleged. (See *Brison C., supra*, 81 Cal.App.4th at p. 1379 [in addition to serious emotional damage, the department must prove "offending parental conduct" and "causation"].) The only allegations sustained were that the parents created a "detrimental home environment" because of an "ongoing custody battle and hostile relationship" to which the children have been repeatedly exposed. But the court described no conduct by the father in support of this allegation. It is easy to infer both an "ongoing custody battle" and a "hostile relationship" from the Department's reports. But if that were all it took to sustain dependency jurisdiction, virtually every custody case could end with the children under the jurisdiction of the dependency court. (See *Brison C., supra*, 81 Cal.App.4th at p. 1382 ["'[i]f parents' poor communications skills and distrust established a need for [juvenile court intervention, it] could assume or continue jurisdiction in virtually every family law case involving custody or visitation issues'"].)

The Department insists there is sufficient evidence "that the children's emotional suffering was caused, in part, by the father's hostile behavior towards the mother." But its only cited evidence of hostile behavior consists of the evidence in support of the domestic violence allegations, to the effect that "the father stuck, pushed and threatened to kill the mother," and these allegations were dismissed – presumably because no such incidents are alleged to have occurred since the parties' separation, 17 months before the Department's petition was filed. (See *Brison C., supra,* 81 Cal.App.4th at p. 1379

["[s]tanding alone, the past infliction of harm does not establish the substantial risk of future harm. Rather, '"there must be some reason to believe the acts may continue in the future"'"].)

This case is much like *In re Alexander K.* (1993) 14 Cal.App.4th 549, in which the father challenged the juvenile court's jurisdictional findings and dispositional order. The juvenile court concluded it could *not* find the father had sexually abused the child, but did find that as a result of the father's conduct, the child had suffered (and was in danger of suffering additional) emotional damage. (*Id.* at p. 556.) The Court of Appeal reversed the jurisdictional order, observing that "the parental conduct branch of subdivision (c) seeks to protect against *abusive* behavior that results in severe emotional damage."[9] (*Id.* at p. 559.) The court continued:

> "We are not talking about run-of-the-mill flaws in our parenting styles – we are talking about abusive, neglectful and/or exploitive conduct toward a child which causes any of the serious symptoms identified in the statute. … [¶] … We have no quarrel with the sufficiency of evidence to sustain the specific facts which the trial court found, but conclude that none of these facts are substantial evidence of abusive maltreatment on [the father's] part toward his son. Simply put, none of the allegations which the court sustained support a finding under subdivision (c) because they focus on the child's behavior and reactions, not the father's behavior. There simply was no abusive conduct." (*In re Alexander K., supra,* 14 Cal.App.4th at p. 559.)

The bottom line is that this case was about the father's alleged sexual abuse of L.B. Indeed, the juvenile court said as much: "[T]he real issue is whether or not these

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[9] Section 300, subdivision (c) allows intervention by the dependency system both when the child's serious emotional damage is caused by parental conduct and when the emotional harm is *not* due to parental fault, "but the parent or parents are unable themselves to provide adequate mental health treatment." (*In re Alexander K., supra,* 14 Cal.App.4th at p. 557; see § 300, subd. (c) [jurisdiction exists as to a child suffering serious emotional damage "who has no parent or guardian capable of providing appropriate care"].)

children were abused or are at risk of being abused." When the court dismissed these allegations, as well as the domestic violence allegations, there was nothing left upon which to base dependency jurisdiction, as there was no other evidence of any improper conduct – including no evidence of any incidents of "ongoing hostility" – by the father. (See *In re Alexander K., supra*, 14 Cal.App.4th at p. 560 ["[t]he why [why the child resisted visiting his father] was never established"; the "allegations concerning sexual abuse, which would have been sufficient to sustain a finding of emotional abuse as well, were rejected by the court"; child's behavior "does not establish abusive conduct *on [father's] part*," emphasis in original].) In short, as in *Alexander K.*, there are no incidents of improper conduct of any kind by the father in evidence to "support a finding of emotional abuse *perpetrated by [the father]*."[10] (*Id.* at p. 560.)

John W. stated, the cases in which juvenile court jurisdiction is necessary, based on severe emotional distress ensuing from divorcing parents' conduct, "should be extremely rare." (*John W., supra*, 41 Cal.App.4th at p. 975.) This case – where there was no psychological evaluation or testimony, and where the only evidence suggesting emotional disturbance was L.B.'s refusal to answer questions and A.B.'s claim that she felt "stressed" and sometimes had headaches and stomachaches – is not one of them.

2. Section 300, subdivision (b).

The Department contends jurisdiction is also proper under section 300, subdivision (b), which permits dependency jurisdiction if the child "has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result

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[10] The Department observes that, even if the father's conduct did not cause emotional damage to the children, dependency jurisdiction would be appropriate based on the conduct of the mother, who does not challenge jurisdiction. (*In re Alexis H.* (2005) 132 Cal.App.4th 11, 16 [the minor is a dependent if the actions of either parent bring her within one of the statutory definitions of a dependent].) But we have found that the Department did not prove a necessary element for jurisdiction under section 300, subdivision (c), namely, that the children are suffering "serious emotional damage … evidenced by severe anxiety, depression, [or] withdrawal …." (§ 300, subd. (c).) Consequently, jurisdiction is not proper against either parent.

of the failure or inability of his or her parent or guardian to adequately supervise or protect the child …." We have already found the evidence insufficient to support a finding that the children are presently suffering, or are at substantial risk of suffering, "serious emotional damage." (§ 300, subd. (c).) It necessarily follows that the very same evidence – of an "ongoing custody battle and hostile relationship" – will not support a finding that the children have suffered, or are at substantial risk of suffering, "serious physical harm or illness …." (§ 300, subd. (b).)

DISPOSITION

The jurisdictional order declaring A.B. and L.B. dependents of the juvenile court is reversed. All subsequent orders are vacated as moot.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOHR, J.*

We concur:

FLIER, Acting P. J.

BIGELOW, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.